

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-1355

To be argued by
T. GORMAN REILLY

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1355

UNITED STATES OF AMERICA,

Appellee,

—v.—

HERBERT I. FASS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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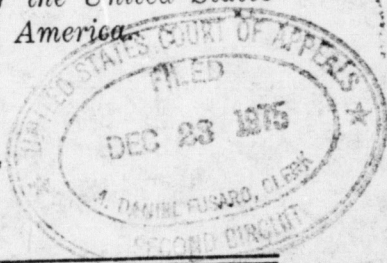


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HERBERT I. FASS,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Herbert I. Fass appeals from a judgment of conviction entered on October 3, 1975, in the United States District Court for the Southern District of New York, after a two-day trial before the Honorable Whitman Knapp, United States District Judge, and a jury.

Information 75 Cr. 156 charged Fass in two counts with wilful destruction of Government property of a value less than \$100, in violation of Title 18, United States Code, Section 1361.

Trial commenced on July 28, 1975 and concluded on July 29, 1975, when the jury found the defendant not guilty on Count One and guilty on Count Two.

On October 3, 1975, Fass was sentenced to a prison term of thirty days. He is at liberty pending this appeal.

Statement of Facts

The Government's Case

The charge on which the defendant Fass was convicted is that, on December 24, 1974, he entered the Post Office in Nyack, New York and defaced a mural hanging in the lobby. This destructive act culminated a two-year campaign by Fass to have a particular section of the mural removed from the Post Office.

The mural in question was painted in 1936 by Jacob Getlar Smith, an artist then in the employ of the Works Project Administration (WPA). It was fastened to the lobby wall of the Nyack Post Office and has hung there even since. The mural depicts various scenes from the history of Rockland County, including the plundering by several Indians of a settlement of white colonists. It is this section of the mural which became the object of the defendant's intense ire. (Tr. 20-22).*

Aloysius Decker, the custodian at the Nyack Post Office, testified that shortly before 8 a.m. on December 24, 1974, he passed through the building lobby on his way to put up the American flag. Decker recalled seeing a man leaning on a table with his back to him. After the flag was raised Decker returned to the lobby where he saw the man, whom he now recognized as Herbert Fass, standing on an overturned waste basket with a portable blowtorch in his hand. Fass had just finished burning a swastika into the mural, and he was about to proceed further with his handiwork. When Decker confronted him, Fass stepped down and a few moments later left the Post Office. (Tr. 47-51).

* "Tr." refers to the trial transcript; "GX" to Government exhibits; and "DX" to defense exhibits.

James Gillespie, the Postmaster of Nyack, New York, testified that he received a telephone call from Fass a few days after Christmas. Fass offered an apology and stated that he had defaced the mural because the postal officials would not take it down. (Tr. 54-56).

Irving G. Weber, the Nyack Postmaster until his retirement in June 1974, testified as to various attempts by Fass to have the mural removed. There was a series of demonstrations wherein Fass blocked access to the Post Office as he sought signatures for a petition to have the mural removed. (Tr. 23-24). On two occasions Fass slapped stickers bearing obscene language on the mural. (Tr. 31-35).^{*} In the Spring of 1974 Fass hauled down the flag from outside the Post Office and refused to return it until the Postal officials agreed to take the mural down. (Tr. 35-36).^{**}

The Defense Case

Herbert Fass, the defense's sole witness, testified at length as to why he objected to the mural and what action he took to have the mural removed. He approached the then Postmaster, Irving Weber, and asked that the mural be taken down. (Tr. 69). He wrote numerous letters to his Congressman, to Senators Javits and Buckley, to the Postmaster General, and to Secretary of State Henry Kissinger. (Tr. 70, 83; DX C, G, H, I). He offered to donate to the Post Office a painting showing a tranquil

^{*} John Martin, a stamp clerk at the Post Office, testified that he observed Fass placing the stickers on the wall on one of the two occasions. (Tr. 45-46).

^{**} Weber also testified to an incident where Fass was observed by him cutting a familiar obscenity into a pane of glass on a door in the Post Office basement. (Tr. 24-28). This incident was the basis for Count One of the Information on which Fass was acquitted.

Indian scene. (Tr. 75-76; DX B). He sought signatures for a petition to the Government to have the mural removed. (Tr. 77-78). In November and December 1974 he asked Postmaster Gillespie to have the mural covered over with paper and holiday decorations during the Thanksgiving, Christmas and Chanuka season. (Tr. 87-88). When the Postmaster failed to act on this request, Fass spoke with Gillespie's superior in the Postal Service, but to no avail. (Tr. 88-90).

All of this evidence was allowed to be considered by the jury, over the Government's objection, on the theory that it shed light on the issue of defendant's wilfulness; for Fass conceded that he defaced the mural with a blowtorch on December 24, 1974. (Tr. 90-91). In fact he stated that he was about ready to burn the word "shame" into the mural before he was interrupted by the building custodian. (Tr. 91).

On cross-examination Fass testified that on the morning in question he went to the Nyack Post Office with the express purpose of damaging the mural with a blowtorch. (Tr. 97). A blowtorch was chosen in preference to a paintbrush or crayons because he wanted the mural to be damaged to such a degree that it would have to be taken down for repairs. (Tr. 97-98).

POINT I

The trial judge properly charged that the defendant's motives for damaging the mural were irrelevant.

Fass' entire defense was that his act of damaging the mural had been born out of frustration at the failure of Government officials to have the mural taken down. The District Judge allowed this evidence on the theory that

it was relevant on the issue of wilfulness. Nonetheless, he charged the jury that it could not consider Fass' motives—be they good or bad—as a defense to the crimes. Adopting a charge that has been approved by the Seventh Circuit in Judge Steven's opinion in *United States v. Cullen*, 454 F.2d 386, 390 (1971), Judge Knapp told the jury that if one commits a crime "under the belief, however sincere, that his conduct was religiously, politically or morally required, that is no defense to the commission of a crime." (Tr. 162).

Clearly, evidence of the defendant's motives was irrelevant to a determination of Fass' guilt and could in no way provide legal justification for the damaging of Government property. *United States v. Cullen*, *supra*; *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970); *United States v. Eberhardt*, 417 F.2d 1009, 1012 (4th Cir. 1969), *cert. denied*, 397 U.S. 1909 (1970). See also *Chase v. United States*, 468 F.2d 141, 142-43 (7th Cir. 1972); *United States v. Simpson*, 460 F.2d 515 (9th Cir. 1972).

Fass' citation to *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974), as authority to the contrary is inapposite. The statement in that tax case opinion that it is possible that a jury might find purpose and motive to negate "wilfulness" as that term has been somewhat uniquely construed in tax violation cases, see *United States v. Murdock*, 290 U.S. 389 (1933), was clearly dictum. Moreover, the Fourth Circuit recognized that this proposition would be in conflict with the controlling authority of *United States v. Moylan*, *supra*. At most the dictum in *Snider* is only of relevance to an income tax evasion case where the element of bad purpose or evil motive must be proven. But see *United States v. Malinowski*, 472 F.2d 850 (3rd Cir. 1972), *cert. denied*, 411 U.S. 970 (1973).

The remaining cases cited by Fass support the wholly unrelated proposition that a claim of self-defense may in exceptional cases defeat a charge of murder or assault. The theoretical basis for recognizing certain limited "justification" defenses, such as self-defense, is that society may benefit when one acts to prevent others from causing serious injury to persons or property. But society countenances, and characterizes as justified, only those actions which are reasonable in the circumstances. See *United States v. Simpson*, *supra*, 460 F.2d at 517-18. Accordingly, reasonable force to repel an attacker may be justified. But here Fass' actions were hardly reasonable. For while the mural may have been offensive to Fass it caused him no physical injury. Moreover, while Fass claimed that the mural had some deleterious impact on his young son, that evil could have been cured, and presumably was cured, by Fass telling the boy in what way the mural was inaccurate or unfair to the Indians. By writing letters to Government officials, seeking signatures for petitions and offering a substitute painting, Fass showed his awareness of what reasonable steps could be taken in response to the offending mural. The fact that his efforts up to that point did not result in the mural's removal did not provide Fass with a license to destroy it. His conduct was clearly not reasonable under the circumstances. Fass could easily have persisted in his peaceful efforts to draw public attention to his views about the mural. With time and persistence, he might well have been able to convince a majority of the citizens of Nyack, New York and officials of the Postal Service that the mural should be replaced.

Since there never was a threat of physical harm, let alone death or serious bodily injury, the defense of justification has no relevance to the instant case. See *United States v. Heliczer*, 373 F.2d 241 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967); *United States v. Cullen*, *supra*, 454

F.2d at 391. Judge Stevens' observations in *United States v. Cullen, supra*, 454 F.2d at 392, where a defendant sought to excuse his destruction of selective service record on the ground that he was religiously compelled, points to the wholly unacceptable, limits of Fass' arguments:

"In a case such as this, if the proof discloses that the prohibited act was voluntary and that the defendant actually knew, or reasonably should have known, that it was a public wrong, the burden of proving the requisite intent has been met; proof of motive, good or bad, has no relevance to that issue.

If defendant's theory of defense were valid, the character of his conduct would be judged not by the rule of law but by the end which his means were designed to serve. His theory is merely another variety of an age-old argument. If a religious, moral, or political purpose may exculpate illegal behavior, one might commit bigamy to avoid eternal damnation; steal from the rich to give alms to the poor; burn and destroy, not merely public records or perhaps buildings but even public servants as well, to implement a Utopian design.

One who elects to serve mankind by taking the law into his own hands thereby demonstrates his conviction that his own ability to determine policy is superior to democratic decision making. Appellant's professed unselfish motivation, rather than a justification, actually identifies a form of arrogance which organized society cannot tolerate.

A simple rule, reiterated by a peaceloving scholar, amply refutes appellant's arrogant theory of defense: 'No man or group is above the law.'"
(footnotes omitted)

POINT II

There was more than ample evidence for the jury to find that the damaged mural was Government property.

Fass argues that the Government failed to prove that the damaged mural was Government property. This claim is frivolous, since there was more than sufficient evidence for the jury to find that the damaged mural was in fact owned by the Government.

The evidence showed that the mural was painted in 1936 as part of a Government WPA project. The mural had been continuously fastened to the Post Office building since 1936. Surely, this more than amply demonstrated that the mural was Government property. Indeed, Fass' entire course of conduct was premised on the assumption that the mural was Government property. All of his letters, petitions, and acts of protest were directed to Government officials. If the mural were the property of the artist or his heirs, as is suggested in Fass' brief (at 10), Fass surely would have directed at least one letter to him. No mention of such a letter was made during the course of defendant's lengthy testimony wherein he chronicled in detail the many attempts he made to have the mural removed. Certainly, the obvious person to petition for such radical relief would have been the owner.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

T. Gorman Reilly being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 23rd day of DECEMBER, 1975,
he served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

HOWARD L. JACOBS, ESQ
401 BROADWAY
NEW YORK, N.Y. 10013

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

T. Gorman Reilly

Sworn to before me this

23rd day of December 1975

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977